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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1992

EDWARD D. COWHIG,

Petitioner, Pro Se

v.

MICHAEL P. W. STONE

Secretary of the Army, Et Al

Respondents/Defendants

[Sometimes referred to as Cowhig v. Chief of Chaplains, U.S. Army et al, in lower courts]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the invocation of the principles of res judicata, statute of limitations or other ordinarily valid legal doctrines can hold in the presence of fraud, the concealment thereof, along with the denial of due process, the violation of statutory law, and the repression of the petitioner's right to the free exercise of his religion?

2. Whether this individual petitioner caught in the legal and administrative crossfire of two powerful institutions, the United States Army and the Catholic Church, has suffered an abrogation of his constitutional rights, overlooked and ignored by all legal and administrative bodies so far, and when each of the aforesaid two parties issue

and assert contradictory and opposite statements regarding the custody, influence and impact of a fraudulent document, certainly disputed, and which document has been asserted by the government as the proximate reason for petitioner's separation from Regular Army status, and which document the government now asserts is and was "properly in the hands of your church?"

3. Whether any reasonable person can call the process and procedure fair when as in this case, the original above mentioned document, having critical, decisive, and determinative radiations as to both military and civilian professional life, is concealed, yet the putative contents utilized by government officials, U.S. Attorneys and Federal judges as true?

4. Whether the Army Board for the Correction of Military records (ABCMR) in

1986 arbitrarily and capriciously refused to consider new and dramatically relevant and exculpatory evidence which is also indicative of medical malpractice on the part of the government?

5. Whether the above mentioned 1986 refusal to reconsider new evidence presented by the petitioner is a further abdication of duty and a furthering pattern of evasion and concealment, and an obstruction of justice, especially in the light of the Court of Claims statement: "Military correction boards have an abiding moral sanction to determine, insofar as is possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief?" (Yee v. United States, 512 F. 2d 1383, 1387-88, 206CT.CL. 388,398 (1975)

6. Whether the government's actions and behavior over the last thirty years

indicate a pattern of obstruction of justice, near malice, reckless disregard of statutory law (10 U.S.C. 1185) (Appendix H), violation of constitutionally guaranteed rights of due process (Appendix J), and manifest a deprivation of the basic right to fairness?

7. Whether the government's continued and continuing effort to avoid responsibility for the care and custody of its own records in violation of its own rules and regulations and in conjunction with an ongoing attempt to force and focus such care and custody onto the officials of this petitioner's church, constitutes fraudulent concealment, prevents reasonable discovery or provability of injury and therefore should stop the clock?

8. Whether when two parties are in pari delicto, are joint tort feasors, either one should enjoy the benefits of time delay, avoidance, procrastination or the statute of limitations doctrine when its partner in reckless misbehavior practices a pattern of obstruction of justice?

9. Whether the false certification filed November 24, 1980, by the government in the Court of Claims action [No. 427-80C] constitutes fraud upon the court and another instance of the perennial pattern of avoidance and obstruction?

10. Whether the government's transmission of a putatively official document to the officials of this petitioner's church without granting to this petitioner any means of cross examination, rebuttal, or even a possibility of a meaningful reading of

such a document is fair or comports with the most simple demands of due process or the opportunity of facing one's accuser and in fact engenders and fosters an impermissible interpenetration or mixing of church and state affairs?

11. Whether a copy of an unauthenticated document, especially in view of the denial of authorship by the putative author, can be properly utilized as evidence in administrative and legal proceedings, as has been done in the long history of this case, particularly when the Rules of Evidence 1002, 1003, 1004(3) state otherwise? (See Appendix M)

12. Whether the First Circuit's embrace as to the application of their "transactional" approach can be properly maintained in the presence of fraud, the concealment thereof, especially when informed thereto, and the clear evidence

of obstruction of justice is also present, along with the denial of this petitoner's function as a "private attorney general?"

13. Whether the clear evidence of reckless disregard of statutory law, 10 U.S.C. 1185 (formerly 3785) (footnote 1) and the Code of Federal Regulations, 32 C.F.R. 65.4(b)(v) (footnote 2) by both the Chief of Chaplains' Office and this petitioner's church officials in the very beginning (1961-1962) of this long dispute and the continuous cover up and concealment thereof is indicative of bad faith by both parties and discrimination in regard to petitioner's civil rights reaching constitutional proportions?

FOOTNOTES

1. 10 U.S.C. 1185 (formerly 3785) a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be: 1) notified in writing of the pendency of any proceeding for his removal; 2) allowed reasonable time to

prepare his defense; 3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and 4) allowed full access to and furnish copies of, records relevant to his case at all stages of the proceeding. (Appendix H)

2. 32 C.F.R. 65.4(b) states the criteria for ecclesiastical endorsing agencies and "...to be considered for DOD recognition each religious faith group shall... (v) abide by the applicable regulations and policies of the Department of Defense." (Appendix K)

3. My discharge papers still have on them Title 10 U.S.C. 3785 as the authority for discharge, and is thus tainted.

14. Whether the perseverance and diligence of this petitioner over a period of many years and in the face of deception and fraud, as well as the patent hostility of adversarial administrative agents and legal counsel, is an example of good faith in the pursuit of justice and in an attempt to rectify an odious pattern of autocratic, dictatorial behavior inimical to the best interests of all Regular Army officers?

15. Whether in the presence of the conclusion of the majority of the Army Board for the Correction of Military Records in 1983-1984 as stated therein, "that although a conspiracy against the applicant was not conclusively proved at the hearings, sufficient evidence was adduced to create the appearance of such a conspiracy and that conspiracy ultimately led to the ill-advised and literally forced and truly involuntary resignation of the applicant from the service;" (No.5, p. 4); together with the later (1986) refusal of that same board to accept evidence indicating medical malpractice and the subsequent denial of responsibility for custody of official documents indicative of bad faith and dereliction of its "abiding duty" to remove an injustice?

16. Whether in the words of the Army Board for Correction of Military Records in its conclusions in 1984 No. 6--"that through an unfortunate combination of circumstances, the actions of his religious superiors effectively precluded the applicant from seeking any meaningful source of recourse;" the demands of exhaustion of administrative remedies; the relentless pursuit of justice in the court system; as well as the continuous and continuing denial of access to the original putative document containing the primal allegations of failure to perform religious duties should not now bar any invocation of the statute of limitations, res judicata, or collateral estoppel?

17. Whether this present petition for certiorari in the case before the First Circuit (91-2027) for which an extension has been granted to November 14,

1992, further extension having been denied, while a companion case (92-1440) based on new, recently discovered evidence, before the same First Circuit has yet to be decided and may well be any day now, presents an additional unnecessary burden impinging on fairness to this nonlawyer, pro se petitioner, whereas this petition for certiorari may well be rendered unnecessary if a favorable decision is rendered by the First Circuit Court of Appeals in the case now under consideration?

18. Whether the statute of limitations as described by the First Circuit herein, begins and the cause of action accrues when "a plaintiff discovered or should have discovered his injury" can hold in this case wherein this petitioner was aware of the obvious lies injurious to him but was rendered impotent

by the collusive actions of both church and state while laboring simultaneously with the burden of top secret classified information, still classified, effectively silencing him?

19. Whether any reasonable person can maintain the statute of limitations, particularly in the last ten to twelve years (1980-1992) while this petitioner has been forced to exhaust administrative remedies, contend with false certification in the Court of Claims (1980-1981); the now clearly erroneous action in the Federal District Court of Massachusetts (1982); action at the First Circuit level (1982); denial of certiorari (1983); Army Board (1983-1984); return to the District Court (1986); action at First Circuit level (1988); denial of Cert. (1989); again to District Court (1990); <u>while all this time the government has been hiding</u>

an essential piece of evidence, which is really the corner stone of this case and then seemingly at wits end, the government in a clearly exculpatory tactic tries to hide under the skirts of petitioner's church by erroneously stating in 1982 that, they, the latter, are the proper custodians?

20. Whether the absence of the full record, the complete record, despite this petitioner's many efforts to acquire the same in original form, and the defendant's duty to provide the same, in which duty they failed, renders all the decisions and judgments administrative and judicial in the long history of this case null and void and indicate that the court's below have so far departed from the accepted and usual course of judicial proceedings or so sanctioned such activity as to call for an

exercise of this Supreme Court's power of supervision? (See Appendix H)

21. Whether an important question of Federal law, raised many times, below, namely and particularly in this instant case, Title 10 U.S.C. 1185 (formerly 3785) and its interpretation and application, which has not been settled below but should be by this Supreme Court?

22. Whether a false statement transmitted to this petitioner's ecclesiastical superiors who acted in overawed trust in what they believed to be a true report of a three star general, resultant in this petitioner's mandated mission as a chaplain to be frustrated, especially when he was especially prescient as to the top secret situation then prevailing in South East Asia and thus constitutes an interference in the free exercise of his religion?

23. Whether the facts and the law have been properly assessed in the lower courts, especially in view of the false certification by the government in the Court of Claim's action, November 24, 1980, and which court made a judgment based on the statute of limitations with no reach to the merits but which decision has been employed by subsequent courts as the basis for the invocation of res judicata ever since?

24. Whether anyone in the judicial process or in "medical procedure" can fairly determine a case legally or medically when essential elements are missing, concealed or occluded by military security? (See Appendix K1)

25. Whether the Army Board's (ABCMR) action 23 May 1986 refusing to accept new medical evidence, along with their statement that the disputed document was

properly "in Church hands" and the Church's absolute denial of custodial responsibility in 1988 should be considered in the light of the statute of limitations especially since this petitioner is required to exhaust his administrative remedies and was informed, 23 May 1986, by the executive secretary of that Board "of your right to institute action in a Federal Court of Competent jurisdiction?" (See Appendix O and P)

26. Whether the procedure, the means and manner of removing this petitioner from his official duty as a Regular Army officer on Okinawa, which according to the later testimony of his immediate commander and executive officer, this petitioner was performing in an outstanding, exemplary fashion, but which at the time was based on an inadequate, faulty diagnosis by ill-informed medical personnel and without

any adequate input on the part of this petitioner because of security regulations, added to the fact that his Officer Efficiency Report (OER) was made up after his departure from that island contrary to military regulations, amounts to a form of imprisonment and a violation of civil rights? (See Appendix K1)

27. Whther the courts below have been deficient by failing to fulfill their responsibility as indicated by Title 5 U.S.C. 552 (a)(4)(B) when on complaint they were notified that a governmental agency was improperly withholding agency records? (*Footnote)

* 5 U.S.C. 552 (a)(4)(B): On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records

are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (B) of this section, and the burden is on the agency to sustain its action.

28. Whether an internal critique of the putative document, only a copy of which is available, can shed a great deal of light upon the motivations of persons unknown responsible for the manufacture of this "virus," this spurious disputed document?

FOOTNOTE

(List of Parties)

Other respondents/defendants referred to by "et al" in this case are:

1. The Chief of Chaplains, U.S. Army

2. The Army Board for the Correction of Military Records (ABCMR)

3. The Surgeon General, U.S. Army

4. The Congressional Liaison Office, U.S. Army

5. The Archdiocese for Military Service, U.S.A. (the endorsing agency for all Catholic Chaplains)

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals, First Circuit was entered March 27, 1992, affirming the District Court's judgment dated June 29, 1991. A timely petition for rehearing was denied June 17, 1992, mandate issued June 29, 1992. The Supreme Court of the United States, July 20, 1992, ordered the filing of a petition for certiorari in case number A-46 be extended to an including November 14, 1992.

The original complaint at issue here was filed in the District Court of Massachusetts on May 16, 1990, as a RICO suit under Title 18 U.S.C. 1961 et seq. Judgment thereto was made on June 29, 1991. Jurisdiction in this supreme Court is involved under 28 U.S.C. 1254(i); 28

U.S.C. 1651(a); article three of the United States Constitution, sections 1 and 2. Jurisdiction is also applicable under the First Amendment ("the free exercise clause") and the Fifth Amendment ("the due process clause").

Previous administrative and legal attempts at redress and efforts to secure justice include recourse to the Military Ordinariate in 1961, 1962, 1964 and following years; recourse to my immediate religious superior in Boston 1961, 1962, 1968 and following years; recourse to the late Speaker of the House of Representatives, John W. McCormack, 1964; petition to and hearing by the Army Board for the Correction of Military Records (1974); other petitions for hearings in following years, denied until 1983; Court of Claims (427-80C); District Court of Massachusetts (81-1616C); United States

Court of Appeals, First Circuit (82-1352); Cert. Denied (82-6395) 18 April 1983; Hearing before ABCMR, Sept. 1983; petition denied 29 March 1984; District Court (#;86-2192Y); United States Court of Appeals, for the First Circuit (#88-1012); rehearing denied 11 January 1989; Cert. Denied 11 April 1989. This instant suit was filed under RICO, 16 May 1990, in the District Court of Massachusetts.

STATEMENT OF CASE

This petitioner is a Roman Catholic priest and has been since 1945. He volunteered for military service in 1950, entered in January 1951. Subsequently, he served as a paratrooper priest in Regular Army status until involuntarily discharged in January 1962 due to a fraudulent report concerning him, accompanied by an absolute denial of due process. This Regular Army Chaplain was also denied the provisions of statutory law at that time and ever since. While this petitioner was handicapped by top secret classified information on a "need-to-know" basis, both his military and religious superiors colluded in a strategy to remove him from active duty. Whether this was a practice usually and normally employed to safeguard what they

might have considered higher institutional values, this petitioner can only conjecture. But in this instant case, the practice was illegal and fraudulent and a device to circumvent statutory law 10 U.S.C. 1185 (then 3785) and constitutional guarantees. Ecclesiastical power was employed to effect a desired result of the Chief of Chaplain's office.

This is clear from the record! Even prior to this petitioner's departure from Okinawa, where his assigned paratrooper combat team had been twice in 1961 alerted for parachute operations into a hostile area (top secret), the Chief of Chaplains' Office had already decided that this petitioner was to be Released from Active Duty (R.A.D.). Of course, this petitioner was completely unaware of such at that time nor until many years later, when he

had an opportunity to peruse the records of that office.

This petitioner resigned reluctantly, and so stated in writing at the time, because the ecclesiastical authority had threatened to withdraw their "endorsement", without which a chaplain cannot serve.

For the period 1961-1980, both entities of church and state refused to grant this petitioner any access to the 1961 document containing allegations. All during this period, I had been doing my best to rectify the situation, even volunteering to serve during the Vietnam War, but was repulsed by the church because of their "understanding" that this petitioner would/could not receive a security clearance.

Finally, in August, 1980, after recourse to the highest ecclesiastical

authority in this country, I obtained a copy of the document preserved in the files of the church in New York. The First Circuit Court of Appeals asserts that at that time in 1980, I should have known of the injury to me. I have known of the injury since 1961, but to prove this injury and the fraud connected with it is something else as can be seen by the cavalier attitude manifested later by government officials and the courts when I produced a letter from the supposed author stating that he never wrote any letter concerning me nor had he authorized anyone, military or civilian, to do so. (Appendix N) So what?, says they!

To this petitioner, a nonlawyer but somewhat versed in the science of logic, the reaction by officialdom is amazing. They merely dismissed the matter as insignificant, yet this document was

described by the leader of the Congressional Liaison office, U.S. Army, in 1964 as "the proximate reason" for this plaintiff's separation from the service. Incidentally, this letter to the late Speaker John W. McCormack misrepresented the addressee of the letter, but I was not to know this until 1980 when I actually for the first time received a copy of that putative document, clearly addressed to the Chief of Chaplains, U.S. Army, hence official.

Time and time again, I was refused access to this document during the period 1961-1980 by church authorities, as well as the government. In 1980, before the Court of Claims, the government filed a false certification as to my complete official Military Personnel File (OMPF) as there was no document of the Lt. General Paul F. Caraway letter therein, yet the

copy I had received in 1980 was clearly addressed to the Chief of Chaplains, U.S. Army.

The application of the doctrine of Statute of Limitations is improper because of the persistent behavior of the Government in denying due process, fraudulently concealing a fraud, delaying proper redress and continuing violation of access to essential records as demanded by the Code of Federal Regulation [32 C.F.R. 581.3 (d)(5)] (Appendix L) and statutory law, 5 U.S.C. 552 (a)(4)(B) and U.S.C. 706. The government even as late as 23 May 1986 stated my right to institute action in the Federal Court in a letter to Congressman Gerry E. Studds of Massachusetts, but the courts below have failed to observe the law as stated in 5 U.S.C. 552 (A)(4)(B), when notified on complaint, (Footnote p. 17) and were

remiss in the application of the scope of review (5 U.S.C. 706) which states in part: "In making the foregoing determinations, the court shall review the whole record or parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." (See Appendix L)

REASONS FOR GRANTING THE WRIT

In this petitioner's relentless pursuit of justice and in the hope that the authorities involved may reform their illegal practices, this current petition for certiorari, the third presented so far, endeavors to indicate and thereby rectify improper procedures for the good of all concerned.

The present petition concerns the application of the Racketeer Influenced Corrupt Organization Act (RICO), which caused this petitioner a great deal of hesitancy to file. But obstruction of justice is one of the prominent concerns of that act, and though this case may be unusual and the circumstances extraordinary, this petitioner feels that he must continue, despite what he

considers an improper invocation of the Statute of Limitations in the courts below. How can any reasonable person so construe the limitations doctrine in the presence of fraudulent concealment and continuing deception? Please remember that this deception was initially perpetrated upon my church and remains as a continued violation of law and regulations. Because I am pressed for time (relying on a 1987 edition of the rules) I applied for,but was denied a further extension of time (plus the fact that all papers have to be down sized and retyped to conform to this court's requirements), I am repeating now the reasons I offered previously in 1988 but which then apparently were ineffective. This procedure also indicates that my entire effort is not a new one but consistent and comprehensive. This pro se

petitioner is amazed that no competent authority has so far realized the inequity of the situation.

Please disregard any references to previous legal actions or references to previous briefs but the basic gist of these reasons are that no one has decided on the merits, no one has decided on the whole, entire, complete record. (For 18 U.S.C. 1961, see Appendix Q)

This case, arising in the context of the sensitive area of Church/State relations, presents a question of significant first impression. It is the question of whether an individual caught in the legal crossfire of two strong and powerful institutions--the United States Army and the Catholic Church--has suffered an abrogation of his constitutional rights when each entity issues contradictory and antithetical statements regarding the

custody, influence, and impact of a disputed document having critical, decisive, and determinative radiations in the case and no process of discovery, from either institution, was accorded the petitioner, leaving him fatally wounded in a juridical "No-Man's Land."

The desirability of receiving an authoritative and unified answer so as to provide guidance in the sensitive and critical area is of compelling significance both to petitioner and to others who, unhappily, might find themselves similarly situated. Uncertainty about the proper reach, result, and radiation of each of the institutions in terms of their appropriate constitutional ambit could have far-reaching consequences on the public policy of the nation if left unsettled.

This case also raised important and troublesome questions concerning the degree of deference to be accorded an agency determination in the case of the Army Board for Correction of Military Records--and the corollary scope of judicial review in that process. In this case, we believe that both the United States District Court and the United States Court of Appeals effectively abdicated their legitimate and mandated role of judicial review by, in effect, according a blind and uncritical deference to the putative "expertise" of the agency is this area. We further believe that by adopting this approach, and in according the totally unnuanced deference to the determinations of the Board, they have effectively closed the door of the federal courts to judicial review in any meaningful measure. In short, we submit

that these federal courts did not accord petitioner meaningful review of his constitutional claims--the very purpose for which federal courts were ordained by the founding fathers.

If allowed to stand, therefore, the decisions below would wrongly thwart judical review of the wide range of substantive and procedural issues generated on the record--in the highly sensitive area of Church/State relations. In short, petitioner submits that review by this Honorable Court is essential to untangle the knots in the flawed analysis in the courts below and redirect the development of judicial decisions in this area to the path contemplated by the wide range of compelling judicial precedents. Petitioner respectfully submits that grant of certiorari by this Honorable Court is clearly warranted on this record.

In addition to seeking grant of the petition of certiorari, the petitioner requests that this Honorable Court exercise its discretionary powers, under 28 U.S.C. 1651(a). We believe that this action is warranted in these exceptional circumstances where adequate relief has been non-available for many years and so far to date has not or cannot be had in any other form or in any other court.

At the outset, it is important to place the issues by the petitioner in context and to understand that by filing suit, the petitioner did not seek to modify the thrust of former suits brought by him challenging his separation from the service, but rather to put in question the action of the Department of the Army's decision to deny relief in 1984. If this Honorable Court cannot review such an action because of the putative

consideration of res judicata or limitations, petitioner, in effect, is left with no remedy to an arbitrary and capricious decision rendered by a government body.

It is the petitioner's fundamental position, a point accorded no deference by the Court of Appeals that the District Court purported to enter judgment on the merits of the case without ever actually considering or coming to grips with the merits of the suit. No discovery was allowed! In that court, as in most other forums, the petitioner was never afforded a "full of fair" opportunity to argue the merits of his cause. The most blatant example of this occurred in petitioner's most recent foray to the ABCMR which summarily rejected without even considering his petition for

reconsideration, as allowed by A.R. 15-185, par. 22 (Appendix M)

Again, in the most recent case before Judge Wolf in 1991 evidence of medical malpractice was submitted in April 1991, a decision was made that same month but the evidence was docketed 7 October 1991 as Item No. 34 when this petitioner made known to the docket clerk the absence of such material. This behavior certainly arouses the well-founded suspicion that the proferred evidence was not even considered.

Therefore, the petitioner simply is seeking an opportunity to argue these matters before an Article III Court on the merits of his grievance, an opportunity which he has been routinely denied despite his persistent efforts to get his constitutional claims before a

constitutional court seemingly the essence of Article III jurisdiction.

We submit that certiorari should be granted here to establish once and for all the core principle that res judicata or statute of limitations should not be a controlling principle in the presence and continuance of fraud and misrepresentation, a result which has continually permeated these proceedings from the very outset. Further, we submit that res judicata should not be allowed to be controlling without needed and essential discovery. It is obvious that the pivotal document here is the 1961 letter of Lieutenant General Paul W. Caraway. That document was the proximate cause of the petitioner's separation from the Army, and not any other alleged or purported reason or circumstance now addressed by the government in a palpable

effort to obscure the real issues here. And yet the petitioner has never been able to gain access to that letter from the Government or get a definitive court ruling that the letter was either spurious or non-existent. And so, petitioner submits that another reason that this Honorable Court should grant certiorari is to address the issue of whether the Government can withhold evidence of a letter purportedly in their custody--a fact never conclusively established--and use such putative and emphemeral evidence affirmatively as a "sword" to eviscerate petitioner's due process claims.

Even after the Army Board of the Correction of Military Records hearing of 1983 and the decision of 1984, the Board's Executive Secretary on 19 June 1984, asserted: "...the Board is unable to ascertain why the original letter/document

from Lt. Gen. Paul W. Caraway is not currently in military files. However, it would appear that the original letter/document is or was in the hands of your Military Ordinariate in New York," (Brief App. p. 137 and Appendix O) an assertion for which there is absolutely no support in the record. Further on, in the same letter, he asserts: "Because the letter was not critical in its determination, the Board made no attempt to determine its authenticity." This statement was made despite the fact that another letter from Lt. Gen Caraway written in 1979 denying authorship by himself or any member of his staff was presented by petitioner as evidence at the 1983 hearing. This apparent mind set has been operative in previous court actions and has colored the entire course of these proceedings. It has presented petitioner

with a legal conundrum straight out of "Alice in Wonderland."

It is now clear that the contents of the purported 1961 Caraway letter were false! Yet, this instrument, and no other, was the cause of the petitioner's separation. Access to this spurious document, in violation of 10 U.S.C. 3785, now 1185, was denied to petitioner by officials of both Church and State--a fundamental violation of due process consistently throughout the course of these proceedings. As petitioner has consistently pointed out below in the context of this kind of proceeding, the invocation of the doctrine of res judicata has a very tenuous and flimsy foundation. Judge Nichols, in his order of 27 February 1981, stated: "We need not address...the merits of the cause of action." And yet the doctrine of res judicata, if it means

anything, clearly assumes that at some point in the proceeding some tribunal has addressed the merits of a claim. That has never happened here at any point in these extended proceedings. The fact that some of the petitioner's claims are constitutional claims and have never been considered on the merits by a constitutional court makes the present situation even more paradoxical in terms of the core presuppositions of Article III jurisdiction.

Earlier in the same decision of the Court of Claims, the judge states: "Plaintiff...was discharged from the Army Chaplains Corps on 23 January 1962 following his voluntary resignation." He now seeks to have that discharge declared null and void and requests that this court remand the action to the Army Board for the Correction of Military Records...."

Again, we see another fatal flaw in these proceedings: petitioner's separation was not "voluntary." It was clearly "involuntary"--a fact belatedly declared so in 1974 and acknowledged by government officials, but again in the evanescent world of "Alice in Wonderland," which has characterized these proceedings, a fact which has never had a meaningful impact on the course of these proceedings in terms of gaining petitioner any meaningful relief from the belated acknowledgment that the critical discharge here at issue was involuntary and not volitional.

Judge Caffrey, in his memorandum of 31 March 1982, in his opening sentence, asserts: "this is a civil action, in the nature of a mandamus, in which the plaintiff...asks the court to compel an officer or employee of the United

States...to perform a duty owed...28 U.S.C. 1361."

However, again, Judge Caffrey never considered the merits of the case, but instead based his decision on the prior order of Judge Nichols which barred petitioner because of a supposed six-year period of limitations, and as we have seen proceeded from a fatally flawed premise that the separation was volitional.

In this regard, it is significant to note that Moore's Federal Practice, in discussing res judicata principles, states: "if the judgment in favor of the defendant is not on the merits, it is conclusive only to what is actually judged." [at 0.409-(6)].

It is our position that nothing was actually resolved, nothing in terms of petitioner's claim was "actually judged": in the Court of Claims. And yet that is a

central requirement for the invocation of the doctrine of res judicata, which the United States Court of Appeals for the First Circuit placed so much emphasis in its decision adverse to the petitioner's claim.

To further show the "Alice in Wonderland" quality of the proceedings in the Court of Claims; action, 24 October 1980, M. Scott Magers, Major JAGC, Chief, Military Personnel Branch, Litigation Division, certified as a "true and exact copy of extracts of the Official Military Personnel File (OMPF) of Edward Cowhig." This was further certified and signed by Clifford L. Alexander, Jr., Secretary of the Army, and Milton Hamilton, Administrative Assistant, as worthy of "full faith and credit." Yet, there was no document of Lt. Gen. Paul Caraway therein, the central piece of evidence in

the entire proceeding. Certifying the extracts as "true and exact" would be as valid as certifying the validity and completeness of a production of Hamlet which had all the characters present except Hamlet.

The plain fact is that the central and crucial piece of evidence was missing, and yet, in his memorandum of 31 March 1982, p. 2, therein, and Exhibit Vol. 3, p.4 - Ct. App., Judge Caffrey asserted: "In 1974...the plaintiff petitioned the ABCMR... After hearing and after examination of ALL the pertinent documents...." In the same memo, "on April 13, 1977...the Board considered the ENTIRE administrative record..." Also, id. at p. 6, "On September 10, 1980, after extensive analysis of all the evidence before it..." But, contrary to the Caffrey decision and as we have now seen, "all"

pertinent documents were not present. Accordingly, we submit that it is ludicrous to suggest that "the entire administrative record" had been reviewed where such a vital, sensitive, and significant document was conspicuous only by its absence.

It is plainly obvious, again, that these assertions are surely not true and were not true when written. The vital missing, evidentary link was still missing and may have been illegally suppressed! And, yet, the above-cited statements became central premises of adjudications addressed to the petitioner, which later became the self-generative judicial "building-blocks" to the ultimate invocation of the lethal phrase: res judicata, and now limitations (1992). And this is the unfairness which has consistently permeated these proceedings

and is the reason why certiorari should be granted here if the phrase due process is to retain meaning in our own day!

The Honorable Court has declared: "Claim, arising under a government contract and subject to administrative determination, first accrues when administrative determination is finally complete, and six-year limitation period runs from that time." Crown Coat Co. v. United States, 386 U.S. 503, 18 L. Ed. 2d 256, 87 S. Ct. 1177 (1967). Because of the centrality of the missing key piece of evidence in this case the administrative determination was never "finally complete," and accordingly, petitioner's claim was not barred by limitations and should not have been perceived to be so.

Another vexing problem unique to this case, and another compelling reason why certiorari should be granted is that the

petitioner has found himself enmeshed in a kind of Church/State juridical "No Man's Land" where a kind of "Wall of Separation," never intended by the founding fathers, has worked in a perverse way to defeat petitioner's claim for meaningful discovery. On the critical issue of the pivotal 1961 "Caraway letter" each side--Church and State--has sought to wash its hands of the responsibility of producing the critical letter. But we submit that, at the very least, there should be an implied contract between the government and the Archdiocese for the Military Services, U.S.A. which would preclude this kind of action. The government establishes the qualifications and conditions of employment and the Archdiocese is the only supplier of Catholic priests (32 C.F.R. 65.4(b)(i)-(v); 510; 581.3) (Appendix N

verbatim - Appendix K, K1, L) and this relationship surely must generate some contractual arrangements which give at least a modicum of protection to an individual situated as petitioner finds himself here.

As this Honorable Court is aware, the courts will not interfere in a judgment of a hierarchically-organized religion. "...Rulings on ecclesiastical matters could not be reviewed. However, the Court noted that this conclusion was true in the absence of fraud, collusion or arbitrariness." Nowak, Rotunda, Young, Constitutional Law, West Pub. Co., quoting Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) at 16.

Petitioner submits that fraud, collusion, and arbitrariness are present in this case.

In petitioner's view, this case goes to the very heart of that relationship of contract! And it is petitioner's claim that one abused the other and that the abuse goes on, with the ultimate loser being the petitioner. One perpetrated fraud on the other! The perpetrator says "it is not really important!" In effect, what everyone is implying by their action is that it is not terribly important that this shocking fraud took place.

Turning to another point, the Court of Appeals for the First Circuit, in its earlier opinion, in 1982, utilized 25 U.S.C. 2501, was "doubtful" about the application of 28 U.S.C. 2401 and ultimately relied on the Doctrine of Laches, saying: "The short of it is that...either barred by prior judicial decision or was too late." (Exhibit Vol. 3, Ct. App., p. 14).

However, at that time, November 1982, the First Circuit indicated, in the opinion written by Judge Davis, that petitioner had "voluntarily" resigned when, in fact, the ABCMR, in 1974, declared petitioner's separation involuntary under Title 10 U.S.C. 3785. This is obviously important since again, it demonstrates that the Court of Appeals proceeded on a faulty premise in invoking laches. It is significant to note that this section (U.S.C. 3785), later renumbered 1185, came under Chapter 359--Spearation from Regular Army for failure to meet standards. Section 3785 dealing with Rights and Procedures states: (a) each officer under consideration for removal...shall be (1) notified in writing, (2) allowed reasonable time to prepare his defense, (3) allowed to appear in person and by counsel..., and (4)

allowed FULL ACCESS to, and FURNISHED copies of, records relevant to his case at all stages of the proceeding.

None of the above requirements were accorded the petitioner in 1961, or in 1974 before the ABCMR, or indeed in 1983, or now (1992). Petitioner was clearly not allowed full access to, nor furnished copies of, official records relevant to petitioner's defense.

Resort to the Freedom of Information Act proved fruitless. No response of any meaning was forthcoming but merely another "shell game."

My original petition to this Honorable Court was denied 18 April 1983. However, ten days after the denial of certiorari, petitioner was granted a formal hearing by the ABCMR. This is most important. The Board granted the hearing

freely and voluntarily and without any action on petitioner's part.

As this Honorable Court well knows, "Military correction boards have abiding moral sanction to determine, insofar as is possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." Yee v. United states, 512 F.2d 1383, 1387-88, 206 Ct. Cl. 388, 398 (1975).

"Secretaries of military departments have duty as well as power to afford servicemen proper relief by correcting military records." Sanders v. United States, 504 F.2d 804 (Ct. Cl. 1979).

As a result of this voluntary action, the ABCMR "de novo" hearing was held in September 1983 (Exhibit Vol. 5, Ct. App. transcript of ABCMR Hearing, 411 pages; Exhibit Vol. 4, Ct. App., 77 Exhibits to ABCMR hearing, 197 pages). Petitioner

submitted an alleged copy, a duplicate, of the 1961 letter of Lt. Gen. Paul W. Caraway to the Chief of Chaplains (Exhibit 19, Exhibit Vol. 4), which, through the intervention of the Pope's representative in the United States, petitioner finally received August 1980, for the very first time. Rule 1003, the General Rules of Evidence, in regard to the admissibility of duplicates states: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." (Appendix M herein). Petitioner also presented a letter from the same Lt. Gen. Caraway, dated 11 July 1979 (Appendix N herein) which states: "I am satisfied that I did not prepare a letter concerning you.

Further, insofar as I can discover, no letter concerning you was prepared by any member of my staff or by any employee in my headquarters, with or without my consent." And based on an extensive telephone conversation with Gen. Caraway, petitioner learned that he had consulted with six other officers whom he considered knowledgable in formulating the judgment that neither he nor any member of his staff prepared the pivotal letter which, again, was the proximate cause of petitioner's removal from the service.

The fact that the 1961 Lt. Gen. Caraway letter was the real, immediate and proximate cause of the petitioner's separation was not given sufficient attention, by the Board. It is obvious that the pressure of time was a definite factor and one of the main reasons why petitioner believes that five-man board

was unable to give due and balanced consideration to all the evidence presented. In retrospect, it is clear that the demand from petitioner's Church authorities to resign was prior to any diagnosis of medical difficulties. The reality is that the demand from petitioner's Church, based on false information, is the one and only cause for petitioner's separation, and that fact has never been fully considered by any tribunal. The actual sequence of events in this matter is as follows: Departed Okinawa 6 October 1961; Caraway letter dated 11 October 1961; resignation demanded 31 October 1961; medical diagnosis, 7 November 1961.

The centrality of the Caraway letter is further made manifest by the following sequence of events: on 28 September 1962--the Chancellor of the Military

Ordinariate (now the Archdiocese for Military Services, USA), J. Marbach wrote to the late Richard Cardinal Cushing, the Archbishop of Boston, asserting; "It is true that the priest thinks the charges were exaggerated, but we are inclined to believe that a three-star general would not send a letter of complaint unless he was certain of the facts" (p.51, par. 3, Ex. Vol. 3, Ct. App.). In the light of the above-cited denial of Lt. Gen. Caraway that he ever wrote such a letter, it is clear how fallacious perceptions shaped events in this matter from the very beginning, and here, once set in motion, they gained a momentum which was impossible for the petitioner to deflect in any meaningful measure.

In the absence of the 1961 Lt. Gen. Caraway letter, it is clear that petitioner would not have been separated

or at least would have been given an opportunity to defend himself which petitioner could have done well since the contents of that spurious letter were blatantly erroneous, particularly in attacking petitioner's religious performance of duty. In short, the safeguards of 10 U.S.C. 3785 were clearly denied to petitioner, and that denial constituted a gross deprivation of due process which has never been effectively addressed by any competent tribunal at any time.

The reality is that the petitioner has been arbitrarily shut-off by the ABCMR since the decision of 1984 in trying to remedy these matters. Petitioner's further request for reconsideration and in presenting new evidence have been stonewalled"--no other phrase will do. The Board has callously replied that

petitioner's efforts to gain reconsideration have been "insufficient," "based on emotion," "repetitious." And yet, in one submission petitioner has sent the ABCMR (1986), testimony of six doctors , a psychologist, three lawyers, all of whom examined the medical and other records, and all of whom found overwhelming evidence that a gross injustice propelled petitioner's discharge from the Army in 1961. All of these submissions, favorable to petitioner, have been spurned out of hand, by all even to 1992. Further written, corroborative testimony by petitioner's commander and executive officer has also been rejected. A letter of Bishop Dimino, Archdiocese for Military Services, USA, 28 August 1984, was similarly treated with bureaucratic disdain. Yet, most significantly this letter stated: "For clarification

purposes, this office would like it to be noted that the Military Ordinariate in 1961 requested Father Cowhig to resign his commission in the Army principally because of a copy of a letter, believed to be authentic, sent from Lieutenant General Paul W. Caraway to the Chief of Chaplains containing adverse comments concerning Father Cowhig." (Brief App., Ct. App., p. 147). In the same, 28 August 1984 letter, Bishop Dimino wrote: "...this office would not oppose his return to active duty as a chaplain," And yet it is now clear that the letter--the reason petitioner had to leave the service--was not authentic. There has been a deprivation of constitutional dimensions and yet no constitutional tribunal has effectively addressed that fact on the merits, but rather have consistently engaged in juridical "shadow boxing" invoking

self-generated consideration of res judicata and limitations.

Please note that this was not a mere request by petitioner's Church authorities on 31 October 1961. It was a demand and so considered by the Chief of Chaplains office (Brief App. p. 93). It had the full force of ecclesiastical authorities and could not be ignored by petitioner if he were to remain a Catholic priest.

Paradoxically, the ABCMR now takes the position, since the decision of 1984, that the Lt. Gen. Caraway letter is not critical and have made no attempt to authenticate it. But, as seen above, this letter was, and is, vitally critical at each and every stage of the Kafka-like drama and effectively killed the petitioner's military career.

In the light of this blatant injustice, not unlike a modern "Dreyfus

Case," this Honorable Court should grant certiorari and then should remand for complete investigation of this fraud as this is still a constitutional issue, since the petitioner has never received due process in the proceedings. Since it is a constitutional issue--never addressed effectively by any Article III tribunal on the merits--concepts of laches obviously are not relevant, a position we have consistently maintained throughout the course of the proceedings.

As the Court of Claims so clearly stated in Werner v. United States, 642-F.2d 404 (Ct.Cl. 1981): "It is clear that the decision of Army Board of Correction of Military Records denying plaintiff's application for the correction of his military records was inadequate in that there was no satisfactory indication that the Board based its decisions of a

balanced consideration of all the evidence presented and available to it." So too, here, and it is central to his petition for certiorari, there has never been a "balanced consideration of all the evidence."

Relative to the question of the sufficiency of the alcoholism allegation, the so-called"alternative grounds" for the disposition below in the District Court and at the First Circuit level, it is clear from the evidence that petitioner was not treated for anything resembling alcoholism at Walter Reed Hospital. Numerous medical experts have testified without exception that the military diagnosis was clearly erroneous. It is also clear from the expert medical testimony of Dr. Roark at the hearing in 1983 that petitioner was not "treated", and that the diagnosis of a

resident-trainee of two months duration was inadequate. The Appeals Court's conclusion that the evidence of petitioner's physical condition was ample and substantial is totally at variance with the evidence of record. The record clearly discloses that petitioner's physical condition was not the cause of petitioner's separation and, at best, was a tangential "make weight."

Any fair reading of the record makes clear that all this persiflage and evidential camouflage about petitioner's drinking is a diversionary maneuver to try to justify, "ex post facto," what was and remains a gross injustice. All the witnesses at the hearing and all the written documentary evidence submitted attest to this and praise petitioner's performance of duty. The reality is that there is no hard, substantial, or ample

evidence to support the position of the government in this case. The government's position is totally devoid of the sine qua non of substantial credible evidence which is essential to withstand judicial scrutiny.

A classic example of the "Rush to Judgment" may be seen in the decision made by the Assistant Secretary of the Army on 29 March 1984 which was within 24 hours of the date the papers were sent to him. It was impossible for him to render a fair, reasonable decision in that time period (over 600 pages of testimony and exhibits). The blinding alacrity with which the decision was made, or the mere signing or "rubber stamping" of prepared papers, shows that the decision, on the face, was capricious and arbitrary. This is especially so as two typewritten papers

were prepared; one to grant relief and the other to deny relief.

The Assistant Secretary's action showed complete disregard of the central fact in these proceedings that Lt. Gen. Caraway had denied writing any letter concerning petitioner. There was a complete insensitivity to the fact that the cause of petitioner's separation was a false letter to plaintiff's religious superiors. A case fabricated out of presuppositions, allegations, assumptions, appearances should not make a CAUSE sufficient to invoke res judicata considerations if the concept of "justice" is still to have relevance in the land.

The total disregard of fact here is manifestly arbitrary and capricious. The total disregard and denial of any substantial evidence is manifestly arbitrary and capricious. There was a

suppression, if only by silence, or clear evidence of collusion and precipitate prejudgment on the part of officials in the Chief of Chaplains' Office and in the then termed Military Ordinariate (now called Archdiocese for Military Services, U.S.A.). Again, this evidence which petitioner only obtained in 1983 was presented to the Board. These are more facts uncovered in late years. They are additional and qualitatively transformational to any factual grouping" or "merger" or "connected facts" or "transaction" which may have existed in the 1981 time period. These late facts, uncovered to this date in 1989, and those still subject to discovery are not identical to what was present in 1981 for the quite simple reality that they had not been uncovered then. To assert against petitioner consideration of res judicata

in this context is, again, Kafka-like in the extreme.

Of course, the basic belief and expression of that belief that petitioner's separation was null and void go back to the very beginning in 1961. That is the identity of issue! That has never been honestly judged--on the merit--by any tribunal at any time.

Even then, in 1961, petitioner tried to overcome this injustice. Petitioner has striven diligently since 1961 to return to military service and all this time tried to discover or uncover what went on behind his back. It is clear that in these thirty-one years, petitioner has succeeded in discovering many concealed and suppressed actions. Petitioner has attempted to bring them to the light of day and to the attention of competent authorities. In this petition for

certiorari, petitioner is still trying to discover, or uncover, the true facts and obtain justice, and it does not seem in the interests of equity and fair-play that the doors of justice should be shut to him now.

These uncovered or discovered "facts" indicate a continued malevolence, an arrogant malice extremely prejudicial to petitioner and the cause he serves, whether in the Army, the Church, or as a citizen. All together, these discoveries of late years indicate a massive cover-up.

In resisting petitioner's position below in the Court of Appeals, on page 9 of the Assistant U.S. Attorney's Brief on Appeal, it is stated: "the rationale underlying the doctrine of res judicata 'rests upon consideration of economy of judicial time and public policy favoring the establishment of certainty in legal

relations.'" (Sunnen, 333 U.S. at 597). But petitioner asks here, as he asked there, how can there by any certainty when even now, the government, "the official custodian" of petitioner's records asserts that it does not have Lt. Gen. Caraway's 1961 letter and attempts after the 1984 decision, to shunt the responsibility to petitioner's Church authorities. This is tantamount to the cover-up of a fraud and, at the least, a kind of juridical "shell game!" The principle that a series of "connected events" or "grouping of facts," based on fraud vitiates the entire transaction and should preclude invocation of res judicata considerations is now so well established that it cannot be disregarded as was done here throughout the course of these proceedings.

Bishop Francis X. Roque, Archdiocese for the Military Services, U.S.A., as

recently as last May 19, 1988, said that he could not add to what Bishop Dimino of the same office had already written 28 August 1984, "But, let me add now that we do not possess the original letter of Lieutenant General Caraway. This was apparently written to the Chief of Chaplains in military channels. We would not possess such a letter nor are we the custodian of military records or documents (Appendix A in Reply). This ongoing "Catch 22" is beyond petitioner's present powers to redress, but certainly cries out for redress through the powers of this Honorable Court.

The petitioner is definitely caught in the middle between these two powerful institutions, Church and State. This Honorable Court should sit to redress this continuing injustice. This "fact" alone should demolish any concept of "factual

grouping" or "connected transactions" implicit in res judicata.

In effect, petitioner has never been granted the opportunity to face his accusers--a blatant absence of due process, and the constitutional guarantee of confrontation which is really what due process is all about.

This Court should not tolerate such behavior. The behavior of the government is surely fraudulent. This Honorable Court has the means to ascertain the truth, while, at this stage, the petitioner is powerless. Petitioner disputed and presently disputes the finality of the 1981 action. He did this to the extent of appearing before the First Circuit in 1982 and presenting oral argument personally. Petitioner went to this Honorable Court subsequently, to further dispute the finality of District

and Court of Appeals' decisions. It was only after the denial of certiorari 18 April 1983 that petitioner received a phone call 28 April 1983 from the Pentagon granting him a formal hearing and instructing him to file a letter of request."

In short, my request now is that someone should review this case properly, with balanced consideration of all the evidence. To date, this has not been done! This is the purpose of the suit at bar and the reasons for the present 1983 and 1988 petitions for certiorari and also in 1992 again! This is not a stale claim, nor is it vexatious. This case has indeed ripened! Indeed, it may also be properly viewed under the provisions of the Administrative Procedures Act.

To date <u>all tribunals</u> which have purported to consider the issues have

overlooked the violation of the petitioner's rights as guaranteed by the Constitution, namely Articles I and V, thereof.

There has been no dereliction or substandard performance of duty as alleged, especially as petitioner was operating with "Top Secret" information (still classified) on a "need to know basis" in perilous circumstances.

CONCLUSION

I humbly petition this Honorable Court to use its inherent powers in the cause of truth, law, and equity and to grant the present petition for certiorari, or to otherwise act. My reputation, a liberty interest, is at stake.

Respectfully submitted

Edward D. Cowhig
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(617) 545-4430

Service made by mail on 3 December 1992 to:

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The Army Board for the
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The Congressional Liaison Office
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The Surgeon General, U.S. Army
The Pentagon
Washington, DC 20310

Resubmitted 3 December 1992 to conform to the Clerk's instructions to petitioner.

Signed: Edward D. Cowhig

Edward D. Cowhig
Petitioner, Pro Se

APPENDIX

Order (Judge Wolf) 25 April 1991.....A

Judgment (Dep. Clerk to Judge Wolf)

29 June 1991.....B

Order (Judge Wolf) 5 August 1991.....C

Appeal, 30 September 1991.....D

Opinion and Order, First Circuit

27 March 1992.....E

Rehearing Denied 17 June 1992

Mandate Issued.....F

Extension of Time Granted (A-46)

20 July 1992.....G

Verbatim Text - 10 U.S.C. 3785, 1185...H

Text of 1, 5, 4(Bill of Rights).....J

Text of 32 C.F.R. 65.4.....K

Text of 32 C.F.R. 510.1.....K1

Text of 32 C.F.R. 581.3.....L

Text of Rules of Evidence.....M

Text of Army Regulations.....M

Text of Lt. Gen. Paul W. Caraway (1979).....N

Letter of Ex. Sec. ABCMR 1982.....O

Letter of Ex. Sec. ABCMR 23 May 1986 .....P,P1

Start of 18 U.S.C. 1961.....Q

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD D. COWHIG,)
Plaintiff,)
)
v.)
)C.A. No. 90-11297-WF
CHIEF OF CHAPLAINS,)
U.S. ARMY, ET AL.,)
Defendants)

ORDER

WOLFE, D.J. April 25, 1991

For the reasons stated by the United States in its memorandum, the claims against it are barred by the doctrines of res judicata and collateral estoppel.

With respect to the claims against the Archdiocese for Military Service, for the reasons stated in its memorandum this action is barred by the statute of limitations.

Accordingly, this action is hereby DISMISSED.

s/Mark L. Wolf
UNITED STATES DISTRICT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD D. COWHIG, Plaintiff,	)
v.	)
	) C.A. No. 90-11297-WF
CHIEF OF CHAPLAINS, U.S. ARMY, ET AT., Defendants	) JUDGMENT

This action came on for a hearing before the court, Wolf, D.J., on motions to dismiss by each of the defendants, and the issues having been duly heard and each of the defendants' motions having been allowed, by Order, dated April 25, 1991,

It is ORDERED AND ADJUDGED:

All of the defendants' motions to dismiss, pursuant to Fed. R. Civ. p. 12, are GRANTED for the reasons set forth in the court's Order of April 15, 1991 and the plaintiff's complaint is DISMISSED in its entirety.

JUDGMENT FOR THE DEFENDANTS.

Dated at Boston, Massachusetts, this 29th day of June, 1991.

BY THE COURT,
S/ , DEPUTY CLERK
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD D. COWHIG,)
Plaintiff,)
)
v.)
)C.A.No.90-CV-11297-WF
CHIEF OF CHAPLAINS,)
ET AL.,)
Defendants)

ORDER

WOLF, D.J. August 5, 1991

Essentially for the reasons stated in the Federal Defendants' Opposition to Motions for Amendment of Judgment filed July 17, 1991 (Docket Number 28), Plaintiff's Motions for Amendment of Judgment Under Rule 52(b) Fed. R. Civ. P.; Right of Trial by Jury, Rule 38(a)(b); New Trial and Amendment of Judgments, Rule 59; Relief from Judgment or Order Rule 60(a)(b) (Docket No. 27), is hereby DENIED.

s/Mark L. Wolf
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD D. COWHIG,	)
	)
v.	)CIVIL ACTION
	)No. 90-11297WF
SECRETARY OF ARMY,	)
ET. AL.	)

NOTICE OF APPEAL

Notice is hereby given that plaintiff, Edward D. Cowhig, pro se, hereby appeals to the United States Court of Appeals For The First Circuit from the order of District Court Judge Mark L. Wolf, denying plaintiff's motions for Amendment of Judgment, under Rule 52(b) Fed. R. Civ.P.; Right of Trial By Jury, Rule 38(a)(b); New Trial and Amendment of Judgments. Rule 59; Relief From Judgment or Order Rule 60 (a)(b) entered in this Action on the 5th day of August, 1991.

s/Edward D. Cowhig
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Greenbush, MA 02040-0154

Docketed 10/1/91
As Item No. 32

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2027

EDWARD D. COWHIG,
Plaintiff, Appellant,

v.

CHIEF OF CHAPLAINS, U.S. ARMY, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Selya, Circuit Judge,
Campbell, Senior Circuit Judge,
and Cyr, Circuit Judge.

Edward D. Cowhig on brief pro se.

United States Attorney, on Motion to Dismiss the Appeal or in the Alternative for Summary Affirmance for appellee Secretary of the Army, et al.
White, on brief for appellee Archdiocese for Military Services, U.S.A.

March 27, 1992

APPENDIX E

Per Curiam. Plaintiff-appellant Edward Cowhig filed this action in the District of Massachusetts on May 16, 1990, claiming that the circumstances surrounding his discharge in January 1962 from his position as a chaplain in the U.S. Army violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") , 18 U.S.C. 1961-68. Cowhig alleged that in 1961 a letter, purporting to be from Army Lt. Gen. Paul Carraway, was sent to the U.S. Army Chief of Chaplains. According to Cowhig, the letter was forged as the result of an illicit conspiracy against him. The letter, which recounted incidents of Cowhig's alcohol abuse, resulted in Cowhig's discharge. Cowhig's complaint named the Secretary of the Army, four different agencies within the Army, and the Archdiocese for Military Services, U.S.A. The district court, in a brief, one-page

order issued April 25, 1991, dismissed Cowhig's claims against the Army defendants on grounds of res judicata and collateral estoppel, and dismissed Cowhig's claims against the Archdiocese as barred by the statute of limitations.

Cowhig already has unsuccessfully challenged his discharge from the Army and sought reinstatement on numerous occasions, albeit without invoking RICO. In Cowhig v. Marsh, 693 F.2d 234 (1st Cir. 1982), cert. denied, 460 U.S. 1092 (1983), this court affirmed an order denying him relief in such a challenge, finding that his action for reinstatement, claiming mistake and fraud, was barred by the statute of Limitations. This court's opinion detailed Cowhig's previous litigation before the Army Board for the Correction of Military Records and the Court of Claims regarding this matter. Id. et 234-235.

Again on October 11, 1988, this court, in an unpublished opinion, affirmed the dismissal on grounds of res judicata of a similar action brought by Cowhig. Cowhig . Secretary of the Army, slip. op., No.88-1012 (1st Cir. 10/11/88). In form Cowhig's action in that case sought review of an adverse determination by the Department of the Army, but in substance Cowhig alleged that his discharge had been induced by erroneous or fraudulent information provided by Army personnel. This court ruled that although Cowhig had asserted a different cause of action than in his prior suit, both actions arose out of the same transactions. Cowhig was merely changing his theory of recovery. Thus, under the "transactional" approach to res judicata embraced by this court in Manego v. Orleans Board of Trade, 773 F.2d 1, 5 (1st Cir. 1985), cert. denied, 475

U.S. 1084 (1986), we found Cowhig's new action to be precluded. SeeRestatement (Second) of Judgments 24 (1982).

Cowhig's instant claims against the five federal defendants are precluded for precisely the same reasons. Now Cowhig claims yet again that his discharge resulted from fraudulent information provided by Army personnel. This time, he relies on RICO for his theory of recovery, but the transactions he alleges are precisely the same as those alleged in his previous suits. For these reasons we stated in our 1988 unpublished opinion, we agree with the district court that principles of res judicata and collateral estoppel preclude the endless re-pouring of old wine into new bottles. See Kale . Combined Insurance Co., 924 F.2d 1161, (1st Cir.); cert. denied, 112 S.Ct. 69 (1991).

Cowhig objects that his prior suit was dismissed on statute of limitations grounds, so that he never received an adjudication of his claims on the merits. This distinction, however, has no relevance for res judicata purposes. "It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect." Id. at 1164.

The five federal defendants named in the complaint herein are (1) the Secretary of the Army; (2) the Chief of Chaplains, U.S. Army; (3) the Surgeon General, U.S. Army; (4) the Chief, Legislative Liaison Office, U.S. Army, and (5) the Army Board for Correction of Military Records. The Secretary of the Army was named as a defendant in Cowhig's last two federal actions. Since the claims against the other four federal defendants involve

defendants involve official actions of the Army rather than any actions taken by any of them personally, we conclude that these defendants are sued in their official capacities. Under res judicata principles, a judgment in favor of the United States in a prior suit precludes relitigation of the same issues between the same plaintiff and other federal defendants in their official capacity. Walsh v. International Longshoremen's Ass'n, 630 F.2d 864, 870 (1st Cir. 1990). Accordingly, res judicata bars Cowhig's action against all five federal defendants.

Since the Archdiocese, unlike the Army, was not a party to any of Cowhig's prior suits, application of res judicata and collateral estoppel principles to bar Cowhig's claims against the Archdiocese is less straightforward. Since Cowhig has had a full and far opportunity to litigate his

discharge in previous actions, the Archdiocese may well be entitled to invoke principles of collateral estoppel defensively to prevent Cowhig from relitigating the matter against it. See Lynch v. Merrell-National Laboratories, 830 F.2d 1190, 1192 (1st Cir. 1987).

In any event, we agree with the district court that Cowhig's claims against the Archdiocese are barred by the statute of limitations. The statute of limitations for civil RICO actions is four years. Agency Holding Corp. . Malley-Duff & Associated, Inc., 483 U.S. 143, 156 (1987). A civil RICO claim accrues "when a plaintiff discovered or should have discovered, his injury." Rodriquez v. Banco Central, 917 F.2d 664, 665-66 (1st Cir. 1990), unless tolled under standard tolling doctrines like fraudulent concealment. Id. at 667-68, and cases cited therein. Here, Cowhig discovered his

injury in 1962 when he was discharged. Thus, his RICO suit is decades late.

Cowhig does allege fraudulent concealment of his cause of action as part of the illicit conspiracy against him. However, his allegation is that defendants conspired to deny him access to the allegedly fraudulent letter of Lt. Gen. Carraway. Cowhig acknowledges, nevertheless, that the Archdiocese ultimately provided him with a copy of that letter in August 1980. As of that date, therefore, he should have known whether he had a cause of action based on alleged misstatements in that letter. Furthermore, Cowhig asserts that in 1979 Lt. Gen. Carraway denied either writing or authorizing the letter. Indeed, the record shows that in a 1979 application for relief from the Army Board for Correction of Military Records, Cowhig alleged that his discharge resulted from "a fraudulent

forged document submitted by unknown persons." Since Cowhig did not bring this RICO suit against the Archdiocese until 1990, eleven years later, the suit is time-barred.

Cowhig's motion for reconsideration of this court's order denying his motion for discovery on appeal is denied.

Cowhig's request for "oral interrogation" in lieu of oral argument is denied.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2027

EDWARD D. COWHIG,
Plaintiff, Appellant,

v.

CHIEF OF CHAPLAINS, U.S. ARMY, ET AL.,
Defendants, Appellees.

Before

Breyer, Chief Judge,
Campbell, Senior Circuit Judge,
Torruella, Selya, Cyr and Boudin, Circuit Judges.

ORDER OF COURT

Entered June 17, 1992

Appellant's petition for rehearing and rehearing en banc is denied.

By the Court:

s/Francis P. Scigliano
Clerk
(cc: Messrs. Cowhig, Farell, and Ms. Forde)

APPENDIX F

CLERK'S OFFICE

U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 91-2027 COWHIG v. CHIEF OF CHAPLAINS

(Date) June 25, 1992

Mandate herein issued today.

s/Francis P. Scigliana, Clerk

APPENDIX F

Supreme Court of the United States

No.

A-46

Edward D. Cowhig,

Petitioner

Chief of Chaplains, United States Army

et al.

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 14, 1992.

s/ David H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 20th day of July, 1992

APPENDIX G

10 U.S.C. 3784: Removal of officer: Action by Secretary of the Army upon recommendation

The Secretary of the Army may remove an officer from the active list of the Regular Army for any cuase that he considers sufficient, if removal for that cause is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive. Aug. 10, 1956, c. 1041, 70A Stat. 219.

10 U.S.C. 3785: Rights and procedures

(a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be--

(1) notified in writing of the pendency of any proceeding for his removal;

(2) allowed reasonable time to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding.

(b) No Person may be a member of more than one board convened under this chapter for the same officer. Aug. 10, 1956, c. 10412, 70A

Title 10 U.S.C. 1185: Rights and procedures

(a) Under regulations prescribed by the Secretary of Defense, each officer required under section 1181 of this title to show cause for retention on active duty--

(1) shall be notified in writing, at least 30 days before the hearing of his case by a board of inquiry, of the reasons for which he is being required to show cause for retention on active duty;

(2) shall be allowed a reasonable time, as determined by the board of inquiry, to prepare his showing of cause for his retention on active duty;

(3) shall be allowed to appear in person and to be represented by counsel at proceedings before the board of inquiry; and

(4) shall be allowed <u>full access to</u>, and shall be furnished copies of, records relevant to his case, except that the board of inquiry shall withhold any record that the Secretary concerned determines should be withheld in the interest of national security.

(b) When a record is withheld under subsection (a)(4), the officer whose case in under consideration shall, to the extent that the interest of national security permits, be furnished a summary of the record so withheld.

BILL OF RIGHTS

Article I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

(b) Criteria for Ecclesiastical Endorsing Agencies: (1) religious faith groups that seek to become ecclesiastical endorsing agencies for the purpose of certifying the professional qualifications of clergy for appointment as chaplains in the Military Services shall obtain DoD recognition through the action of the Armed Forces Chaplains Board (AFCB). To be considered for DoD recognition each religious faith group shall:

(i) Be organized exclusively or substantially to provide religious services to a lay constituency.

(ii) Be able to exercise ecclesiastical authority to grant or withdraw ecclesiastical endorsements.

(iii) Be able to provide continuing validation of ecclesiastical endorsements.

(iv) Be able to endorse clergy who are qualified to provide for the free exercise of religion by all members of the Military Services, their dependents, and other authorized persons.

(v) <u>Abide by the applicable regulations and policies of the Department of Defense.</u>

PART 510 - CHAPLAINS

510.1 Private Ministrations, Sacraments, and Ordinances

Chaplains will conduct or arrange for appropriate burial services at the interment of members of the military service, active and retired, and for members of their families upon request. A chaplain may perform the marriage rite, provided he complies with the civil law of the place where the marriage is to be solemnized and provided all parties concerned have complied with the requirements of the denomination the chaplain represents and with any directives which may have been issued by the military command or higher headquarters. The scope of the chaplains' work will include such ministrations as are held by some denominations or religious bodies as sacraments and by others as rites or ordinances. Chaplains will administer or arrange for rites and sacraments for military personnel and civilians under military jurisdiction according to The respective beliefs and conscientious practices of all concerned.

(5) Access to Records: (1) The applicant will be assured access to all official records that are necessary to an adequate presentation of his case consistent with regulations governing privileged or classified material. It is the responsibility of the applicant to procure such evidence not contained in the official records of the Department of the Army as he desires to present in support of his case.

SCOPE OF REVIEW
TITLE 5 U.S.C. 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the courts shall review the whole record or those parts of it cited by a part, and due account shall be taken of the rule of prejudicial error.

RULE 1002: REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

RULE 1003: ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original of (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004: ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party wad put on notice by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

ARMY REGULATION 15-185, PAR. 22

Reconsideration: After final adjudication, further consideration will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army.

4450 South Park Avenue
Chevy Chase, MD 20015
11 July 1979

Father E. Cowhig
Saint Jude's Rectory
Main Street
Norfolk, MA 02056

Sir:

I am satisfied that I did not prepare a letter concerning you. Further, in as far as I can discover, no letter concerning you was prepared by any member of my staff or by any employee in my headquarters with or without my consent.

Yours truly

s/ Paul W. Caraway
Lt. Gen. U.S. Army

Appendix N

SBMR COWHIG, EDWARD

016-14-7279

Application for Correction
of Military Records

OSA, SALL OSA, ABCMR 23 SEP 1982
ATTN: Ms. Locke 1E517
Mr. Goodman/ts/79515

Following is information upon which to base a reply to Congressman John Joseph Moakley, in the case of the above named individual.

Copies of the Army Board for Correction of Military Records (ABCMR) actions pertaining to Father Cowhig's case have been reviewed. Based on the review, it appears that he has received fair, full and impartial consideration of the issues raised before the ABCMR. Father Cowhig was granted a formal review of his case on 14 August 1974, in which he personally appeared, with counsel, before the ABCMR. On 15 October 1974, the Under Secretary of the Army approved the Board's findings, conclusions, and recommendation that Father Cowhig's records be corrected to show that he was involuntarily released from active duty on 23 January 1962. Since that time, Father Cowhig, personally or through elected officials, has been advised that after final adjudication further consideration of his case will be granted only upon presentation of newly discovered relevant evidence

not previously considered by the Board and then only upon recommendation and approval of the Secretary of the Army.

As other Representatives in Congress have been advised, the Board's decision to not grant a second hearing in Father Cowhig's case was not based solely on the letter purportedly written by General Carraway and which is now properly in the files of the Military Ordinariate in New York City. The decision was based on substantial evidence that he was a practicing alcoholic in 1961, who chose not to abstain from the abuse of alcohol after being hospitalized on several occasions for treatment. His abuse of alcohol resulted in his being relieved of his duties and his being returned from overseas for treatment at the Walter Reed Army Medical Center.

The ABCMR is the appropriate avenue to obtain Secretarial relief of any perceived inequity or injustice. Please advise Father Cowhig if he possesses any material or relevant evidence which he has not submitted previously, he should submit it immediately to the Board for consideration. Otherwise, his administrative remedies have been exhausted.

S/John W. Matthews
Executive Secretary

23 May 1986

Cowhig, Edward D.
016-14-7279

Reverend Edward D. Cowhig
Greenbush, Massachusetts 02040

Dear Reverend Cowhig:

This is in reference to your recent letters to the Secretary of the Army, Principal Deputy Assistant Secretary (Manpower and Reserve Affairs), Congressman Gerry E. Studds, and to your letter of 29 April 1986 concerning the review of your application for correction of military records.

Although this is repetitive of information previously furnished to you, I must again state that in the enactment of Section 207 of the Legislative Reorganization Act of 1946, now codefied in 10 U.S.C. 1552, the Congress vested authority for the correction of Army records in the Secretary of the Army, and he may act only through the Board for Correction of Military Records. The provisions of this law are clear, and do not include any authority for review of your case by any other officer or official of the Executive Branch of the Federal Government.

As you know, your case has been reviewed on numerous occasions, to include two formal hearings, in connection with your desire for relief through this Board. You were provided ample opportunity to furnish or present to the Board any evidence you desired for its consideration

during the course of these hearings. The information, which you have submitted subsequent to your last hearing, has been carefully studied and the content appears to be substantially similar to information previously submitted and considered by the Board. Accordingly, it has been determined that no new relevant information has been presented to warrant reopening of your case. "New and material evidence"if considered to be evidence, which if previously evaluated by the Board, could reasonably be expected to have resulted in a finding other than that rendered as a result of the prior review of your case. Evidence, which is repetitious or based on emotion or which tends to elaborate on facts previously considered by the Bard is not deemed to be new and relevant material evidence.

The Correction Board has a considerable backlog of applications, the majority of which have not received an original review and consideration; as opposed to your case, which has been considered and reconsidered on many occasions. While your concern and desires are recognized, it is unfair and discriminatory to expend time in responding to your repeated requests which are duplicative in nature of what you have asked for previously.

Therefore, I must respectfully inform you that, in response to any future correspondence, you will be furnished a copy of this letter.

You are again reminded, if you desire additional review of the Board's action, of your right to institute action in a Federal Court of competent jurisdiction.

Sincerely,

s/Karl Bielenberg
Executive Secretary

cc: Honorable Gerry E. Studds

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

1961 Definitions

As used in this chapter (18U.S.C.S. 1961 et seq.)

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United Sates Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471,472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955